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NO. 83-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM R. McCANN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

DARYL A. ROBINSON
Assistant Attorney General
Counsel of Record for Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

VICTORIA H. SOTO
Assistant Attorney General

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3356

QUESTIONS PRESENTED

1.

Whether O.C.G.A. § 40-6-392 is constitutional in providing that certain factual presumptions arise from given levels of blood alcohol content for purposes of defining the crime of driving under the influence of alcohol (DUI).

2.

Whether the trial court's jury charge regarding statutory factual presumptions contained in Georgia's DUI law fulfilled the Petitioner's right to due process of law.

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PART ONE

STATEMENT OF THE CASE

Petitioner, William R. McCann, was tried by a jury on charges of speeding and driving under the influence of alcohol (DUI). Only the DUI charge is at issue here.

The State's evidence presented at trial showed that Petitioner had a blood alcohol level of .11 grams/cc shortly after his arrest. Petitioner's evidence tended to show that he did not exhibit behavior associated with intoxication at the time of his arrest.

Based upon this evidence, Petitioner was found guilty as charged pursuant to O.C.G.A. § 40-6-391 and sentenced to a twelve month probated term and a $250 fine.

Petitioner appealed to the Georgia Court of Appeals, which affirmed his conviction below. Certiorari was denied by the Supreme Court of Georgia. Petitioner now seeks review of his conviction by this Court on a petition for a writ of certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE LANGUAGE OF O.C.G.A. § 40-6-392 IS CONSTITUTIONAL INASMUCH AS IT SETS FORTH PRESUMPTIONS OF FACT WHICH BEAR A RATIONAL CONNECTION WITH THE ULTIMATE FACT TO BE PROVED IN ACCORDANCE WITH WELL SETTLED STANDARDS ESTABLISHED BY THIS COURT.

Petitioner's assertion that O.C.G.A. § 40-6-392 unconstitutionally forces a criminal defendant to refute a presumption of guilt where his blood alcohol level exceeds .10 grams/cc is without merit. The factual presumptions created by the Georgia statute are

nothing more than permissive inferences developed to guide lay jurors in weighing scientific evidence.

As this Court explained in one of the cases relied upon by Petitioner, "[i]nferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime...from the existence of one or more evidentiary or basic facts." County Court of Ulster County v. Allen, 442 U.S. 140, 156, 60 L.Ed.2d 777, 99 S.Ct. 2213 (1979).

The controlling test for determining the validity of a statutory presumption is whether there is a rational connection between the facts proved and the facts presumed. Leary v. United States, 395 U.S. 6, 33, 23 L.Ed.2d 57,

89 S.Ct. 1532 (1979); Tot v. United States, 319 U.S. 463, 467 87 LEd 1519, 63 S.Ct. 1241 (1943).

Petitioner correctly asserts that a statutory presumption may not serve to shift the burden to the Defendant to disprove an element of the offense charged "by superior evidence." Brief of Petitioner, p. 19. A reading of the statute, however, reveals no reference to the weight to be accorded the factual presumptions set forth therein or the quantum of evidence required to rebut the presumptions. Indeed, the statute itself does nothing more than present guidelines which may be relied upon by a jury to the extent it deems appropriate in light of the evidence presented and the judge's charge.

The need for such guidance is readily apparent in view of several factors which have become common knowledge:

1.

The incidence of driving under the influence is a serious and growing problem faced by state lawmakers.

2.

Speedy and effective prosecution of DUI cases is essential to controlling this problem.

3.

Proof of intoxication involves sophisticated scientific and medical evidence which, absent statutory recognition of

generally accepted factual inferences, would render speedy and effective prosecution of such cases impracticable. See Brief of Petitioner, pp. 10-11, 41-42.

4.

Evidence of an individual's blood alcohol level provides a generally accepted means of inferring the probability of intoxication.

In matters such as this which are not within specialized judicial competence or completely commonplace, this Court has held that "significant weight should be accorded the capacity of [the legislative body] to amass the stuff of actual experience and cull conclusions from it." Leary v. U.S.,

supra, at 35; United States v. Gainey, 380 U.S. 63, 67, 13 L.Ed.2d 658, 85 S.Ct. 754.

There is nothing in the statute challenged by Petitioner which would prevent a jury from concluding that an individual whose blood alcohol level was .04 grams/cc was intoxicated in spite of the presumption in his favor or that one who recorded a level of .15 grams/cc was not, depending upon the weight accorded other evidence. Thus, the statute does not usurp the jury's factfinding function and is therefore constitutional on its face according to the standards established by this Court.

B. THE TRIAL COURT PROPERLY CHARGED THE JURY REGARDING THE APPLICATION OF O.C.G.A. § 40-6-392 IN COMPLIANCE WITH STANDARDS LONG ESTABLISHED BY THIS COURT REQUIRING THAT THE BURDEN OF PROOF REMAIN AT ALL TIMES ON THE STATE.

A review of the jury charge given at the trial of Petitioner, Brief of Petitioner, A 13-17, contradicts Petitioner's contention that the charge improperly shifted the burden of proof to the Defendant.

As Petitioner correctly states, a legal presumption may not be applied in such a way as to place the burden

on the Defendant to disprove the presumed or inferred fact by superior evidence. Sandstrom v. Montana, 442 U.S. 510 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979). Petitioner misconstrues the Sandstrom rule, however, as eliminating entirely the right of the jury to rely upon presumptions or inferences, even in the absence of any evidence tending to refute the presumed or inferred fact. The latter is not the rule set down by the court in Sandstrom, which held only that a presumption which might have been construed by the jury to be conclusive was impermissible. In considering as a whole the charge in the instant case, it is clear that the presumption stated is not a conclusive presumption

like that found impermissible under Sandstrom.

The question then becomes whether a reasonable juror could interpret the charge as shifting the burden of persuasion to the Defendant. At most, the charge in the instant case creates a permissive presumption of the type considered in Ulster County Court v. Allen, supra. This type of presumption allows, but does not require, the trier of fact to infer an elemental fact from proof of a basic fact without placing any burden on the Defendant. Having established previously that the inference challenged here fulfills the rational connection test of Leary v. United States, supra, Respondent submits that the charge did not impermissibly shift

the burden of proof or persuasion to the Petitioner when considered in light of the charge as a whole. Cupp v. Naughten, 414 U.S. 141, 146-147, 38 LE2d 368, 94 S.Ct. 396 (1973).

Even if this Court were to consider that the charge to the jury concerning the statutory presumptions did, in fact, impermissibly shift the burden to Petitioner, Respondent submits that the charge should be determined to be harmless beyond a reasonable doubt under the principles of Chapman v. California, 386 U.S. 18 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). In the instant case, the jury was instructed that the statutory presumption disappeared entirely upon the Defendant's presentation of any evidence tending to disprove the

presumed fact. Brief of Petitioner, A-16. Moreover, Defendant did present such evidence in the form of testimony by both his wife and the arresting officer. Thus, the statutory presumption having "disappeared" in accordance with the judge's instructions, there could have been no prejudice to Petitioner's cause even if the instruction had been improper.

It is well settled law that a jury charge challenged on grounds of burden shifting must be considered in its entirety in order that the reviewing court may properly determine whether the jury reasonably could have understood the burden of proof to have shifted to the Defendant. Cupp v. Naughten, supra, Sandstrom v. Montana, supra. Such a consideration of the

charge of the court below confirms the conclusion of the Georgia Court of Appeals that the burden of proof remained at all times on the State to prove the Defendant's guilt and that the court's charge to the jury comported with the standards set down by this Court.

In conclusion, Respondent submits that the Petitioner has raised no new issue of law for consideration by this Court and submits further that the language of O.C.G.A. § 40-6-392 and the charge to the jury based upon this language fulfilled the Petitioner's constitutional right to due process as defined by prior decisions of this Court. Accordingly, there is no merit to the issues raised in the petition.

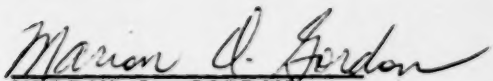
CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court to deny the Petition for a writ of certiorari filed on behalf of the Petitioner, William R. McCann.

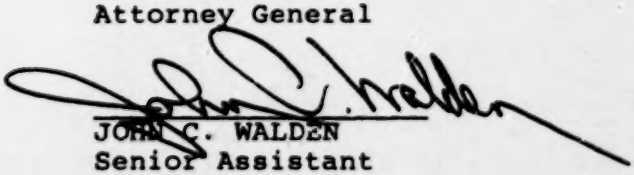
Respectfully submitted

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General



MARION O. GORDON
First Assistant
Attorney General



JOHN C. WALDEN
Senior Assistant
Attorney General

(Signatures Continued)

VICTORIA H. SOTO
Assistant Attorney General

Please serve:
VICTORIA H. SOTO
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3356

ST

CERTIFICATE OF SERVICE

I, DARYL A. ROBINSON, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with proper address and adequate postage thereto to:

Howard Tate Scott
Post Office Box 1101
Athens, Georgia 30601

This 2nd day of December, 1983.

/s/ DARYL A. ROBINSON